25312

No. 902

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To be argued by
Paul Ginsburg of Pittsburgh

United States Court of Appeals

FOR THE SECOND CIRCUIT

NO. 25312

PAUL GINSBURG, Plaintiff-Appellant,

v.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Defendant-Appellee.

PETITION FOR REHEARING

PAUL GINSBURG
Appellant, Pro se

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550 Grant Street
Pittsburgh 19, Pa.

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U.S. COURT OF APPEALS
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PETITION FOR REHEARING

To the Honorable, the Chief Judge and the Judges of said Court:

The petition for rehearing of Paul Ginsburg, appellant, respectfully represents:

1. On January 15, 1959, this appeal was argued before: Medina, Lumbard and Burger, Circuit Judges. At the outset, Judge Medina, presiding, persuaded counsel to shorten the time for arguments unduly by assurance that the Judges had already read the briefs.

2. On January 28, 1959, this Court's decision was rendered, from which it is obvious that the Court misapprehended the entire appeal. The said decision in full is as follows:

> "Appeal from the United States District Court for the Southern District of New York, Alexander Bicks, *Judge*.
>
> "Paul Ginsburg appeals from an order of the District Court refusing to vacate a prior order denying his motion for summary judgment and declaring the action "enjoined" because an unvacated interpleader injunction of another Federal Court prohibited further procedural steps toward recovery. Opinion below not reported. Affirmed.
>
> "Per Curiam: Affirmed on the opinion of Judge Bicks, filed July 29, 1958."

3. It is a matter of record to the contrary, apparent from Appellant's Brief (p. 5), that this appeal is actually from District Judge Bicks' Order dated June 27, 1958, which was not accompanied by an Opinion, whereby plaintiff's tenable and legally supported Motion for Summary Judgment was erroneously denied and defendant's untimely, insupportable "Counter-motion" to have the action marked "enjoined" was granted. Fur-

thermore, the Notice of Appeal was filed on July 25. 1958, prior to Judge Bicks' Order refusing the motion to vacate his Order which was appealed from, and hence Judge Bicks' said second order dated July 29, 1958, which was accompanied by an opinion, could not be the subject of an appeal (Appellant's Brief, p. 6) for two reasons. In the first place, an appeal lies only from the lower court's adjudication, not from its refusal to reconsider. In the second place, since Judge Bicks' second order and its accompanying opinion were filed erroneously after the Notice of Appeal (as well as after the expiration of the time for filing the Notice of Appeal) they are not properly a part of the Record on this appeal. Therefore, there is no procedural or substantive basis for this Court's affirmance "on the opinion of Judge Bicks, filed July 29, 1958". As a result, the only accurate one of the few sentences in this Court's decision is, "Opinion below not reported", and necessarily so.

The Appellant Has, In Effect, Been Deprived Of His Right Of Appeal.

4. This Honorable Court overlooked or misapprehended every one of appellant's Points, all of which are fully supported under the Federal Rules of Civil Procedure and the applicable law (Appellant's Brief, pp. 7-13), having been submitted as follows:

> "1. An affirmative defense which is not pleaded pursuant to Rule 8(c) is waived pursuant to Rule 12(h). Therefore, the defendant waived its right to claim injunctive relief below, assuming but not admitting that it had such a right. Furthermore, the affidavits of Arthur Kaiser are not and cannot be considered as pleadings under the Rules, rendering them void of consideration.

"2. District Court Judges are bound by the Federal Rules of Civil Procedure as by an Act of Congress, and they are powerless to waive the Rules. Therefore, Judge Bicks was powerless (1) to consider and regard the affidavits of Arthur Kaiser as constituting defendant's answer timely filed setting forth the facts contained therein as a defense to the complaint, because said untimely affidavits are not pleadings and the 'facts' contained therein would simply constitute an affirmative defense assuming but not admitting them to be true and properly pleaded; (2) to order plaintiff permanently enjoined and prohibited from prosecuting this action, because there was no record basis for such an order; and (3) to order this action marked 'enjoined.'

"3. Under the Federal Rules of Civil Procedure and the applicable law, Judge Bicks had no alternative but to enter summary judgment for the plaintiff and against the defendant.

"4. The Court of Appeals, in the exercise of its supervisory control over District Judge Bicks, should vacate his Order entered June 27, 1958, and remand the cause with directions to enter summary judgment for the plaintiff against the defendant."

Appellant's Reply Brief Was Ignored.

5. Appellant's Reply Brief shows how professionally obnoxious is the appellee's Brief from every point of view, and that it is wholly without merit.

Affirmance Could Result in a Policy Racket.

6. The plaintiff-appellant not only is the sole beneficiary named in the policies of insurance on the life of his brother, but also is the absolute owner of those contracts of insurance. If such "scrap of paper" treatment (Reply Brief, p. 2) is sanctioned for life insurance con-

tracts, then a lucrative coast-to-coast policy-"shyster" racket could obviously result, destroying all confidence even in the legitimate life insurance companies. Does the Mutual Life Insurance Company of New York really believe that your appellant was paying premiums on the insurance contracts for such abuse? Incidentally, along the same line, such a preposterous thought would be no different from the unrealistic notion that your appellant has been repeatedly making large disbursements for fees, printing, traveling and hotel expenses in connection herewith for summary denials of his rights, which do not even pretend to include a discussion of his points and a legal adjudication of them.

Litigants Should Not Be Subjected to Government By Men.

7. Regardless of District Judge Bicks' personal opinions and views of the justice in a court action pending before him, he must dispense justice under the law. No matter how strongly District Judge Bicks may feel about his personal opinions, or how contrarily to the Rules and law, justice is what the law says it is and United States Judges are bound thereby. In the instant case, District Judge Bicks ignored the dictates of the Rules and the mandates of the Law, and substituted therefor his personal "rules and laws" which he cannot do lawfully in America. That is not "The American Way." It is the totalitarian way, un-American and foreign. Should this Honorable Court have given sanction to that, as it did?

Judge Bicks Should Not Have Donated a Defense to the Defendant.

8. Since nothing of record indicates that those representing The Mutual Life Insurance Company of New York are in need of protection by guardian because of mental or physical incompetence, minority or senility, or any other reason, District Judge Bicks was indiscreet to grant the defendant *nunc pro tunc* a non-existent (or even legal) defense not pleaded and therefore waived, to "protect" the defendant from its liabilities imposed by law. That is precisely the sort of action that calls for an exercise of supervisory control by the Court of Appeals to insure proper judicial administration in the Federal System, according to the Supreme Court (Appellant's Brief, p. 13). **A fastidious regard for the honor of the fair administration of justice requires that the Court of Appeals refuse to sanction such a departure from the usual and accepted course of judicial proceedings;** otherwise, the Supreme Court under Section 1(b) of its Rule 19 will grant *certiorari*.

Appellant Deserves Due Process of Law.

9. When presiding Judge Medina stated at the opening of the "argument" before this Honorable Court that he thought the plaintiff-appellant was bound by an injunction in another Circuit and was obliged to try to get out of it in this Circuit, your appellant while denying that to be in issue felt like the political prisoner in an Iron Curtain Country who was told by the Dictator that he would receive a fair trial, be convicted and hanged. Your appellant's feeling has been justified in the Court's decision which covers less than half a page, contains no

legal authority, and fails to disclose what the issues before the Court really are. Any experienced practitioner could see between the few lines of the decision that the main issues of the appeal must have been swept under the rug on the courtroom floor.

The Judge and His Oath.

10. "The Judge And His God" is the title of a "sermon" delivered by Hon. Harold R. Medina before the Church Club of New York City on February 5, 1951, because he thought it was time that "the impact of religion" upon Judges was discussed (reported in the Pittsburgh Legal Journal, Vol. 99, 1951, No. 12, pp. 6-7). This laudable thought of Judge Medina is highly commendable. Numerous experiences over the years with bad court decisions have caused your appellant to advocate that same thought, because of the apparent absence of God when Court decisions are rendered by some Judges. The impact of religion is essential to equal justice under the law, because when a litigant is judged by a Judge and his God, he shall be judged by a Judge and his Oath. From such judgment, no appeal.

Back to Church.

11. Judge Medina declared that he has gone to Church to pray "for divine guidance and for strength to do his duty" from "the one source that never fails". Your appellant failed to observe any such humility during the course of his oral argument. Experience has proved that petitions for rehearing are not granted, because human Judges without God (and without Oath) stubbornly and incessantly refuse to concede that they overlooked or misapprehended anything or that such fail-

ings are even possible. As a right, rehearing is merely illusory; as a remedy, it is positively atrophic. But not so in this case, because here we at last are before a Judge and his God and his Oath. The Honorable Harold R. Medina will, during consideration of this petition for rehearing, go back to St. James' Church and pray,—not, it is hoped, for your appellant as he says that he has done for other litigants, but for "divine guidance and for strength to do his duty". Thereupon justice will be done,—not as District Judge Ricks thinks it ought to be done, but as the Law dictates. Your appellant humbly thanks The Lord that he presently is before a Judge and his God.

Let the Master, Not His Servants, Pull the Next Strings.

12. "After all is said and done, it is not we who pull the strings; we are not the masters, but the servants of our Master's will, and it is well that we should know it to be so", said Judge Medina. Let it not be said by Judge Medina or anybody else learned in the law, that the strings previously pulled herein were pulled by our Master or by His servants. They were obviously pulled by "Judges" without Him. Yet it was natural for them to err, and your appellant forgives them for they knew not what they do. "To err is human, and to forgive is divine". However, with the approaching realization of what is required, your appellant's Judges will do justice and act humbly under the Law. They will merely be the servants of our Master's will, and they shall not interfere when our Master pulls the strings.

Wherefore, your appellant *prays* that this Honorable Court will grant this petition for rehearing.

PAUL GINSBURG,
Appellant-Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

PAUL GINSBURG,
Counsel for Appellant.

9 February, 1959.